APR 4 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 73-1478

OCTOBER TERM, 1973

AMADEO AUGUSTO LUCIANO SANTELISES, JR.,

Petitioner,

-against-

IMMIGRATION & NATURALIZATION SERVICE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRUIT

FRIED, FRAGOMEN & DEL REY
Attorneys for Petitioner
515 Madison Avenue
New York, New York
Tel. 688-8555

Dick Bailey Printers • P.O. Box X, Staten Island, N.Y. 10302 • Tel.: (212) 447-5358

TABLE OF CONTENTS

Page

Petition for Writ of Certiorari 1

Decision Below 1

Statement of Case 2

Basis for Federal Jurisdiction 3

Reasons for Allowing the Writ 3

Conclusion 7

APPENDIX

Opinion of the Court of Appeals A-1

Decision of the Board of Immigration Appeals B-1

CASES CITED

Bolling v. Sharp, 347 U.S. 497 (1954) 6

Furman v. Georgia, 408 U.S. 238 (1972) 5

Graham v. Richardson, 403 U.S. 365 (1971) 6

Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) 5

Loving v. Virginia, 388 U.S. 1 (1967) 6

Shapiro v. Thompson, 394 U.S. 618 (1969) 6

Sugarman v. Dougall, 93 S.Ct. 2842 (1973) 6

Takahashi v. Fish & Game Commission, 334 U.S. 410 (1948) 6

Trop v. Dulles, 356 U.S. 86 (1958) 4

United States Department of Agriculture Moreno, 93 S.Ct. 2821 (1974) 6

STATUTES CITED

28 U.S.C. Section 1254(1), 62 Stat. 928 (1948) 1
Immigration & Nationality Act of 1952, as amended,
Immigration & Nationality Act of 1952, as amended,
66 Stat. 163 (1952) 8 U.S.C. Sections 1101, etc.,
Section 241(a)(5); 8 U.S.C. Section 1251(a)(5);
Section 402(a); 48 U.S.C. Section 1546 2
Nationality Act of 1940, as amended,
Section 401(g); 8 U.S.C. 1481(a) 4

AUTHORITIES

Navasky, *Deportation as Punishment*,
37 U. Kansas City L. Rev. 213 (1959) 4

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

———O———

AMADEO AUGUSTO LUCIANO SANTELISES, JR.,
Petitioner.

-against-

IMMIGRATION & NATURALIZATION SERVICE,
Respondent.

———O———

PETITION FOR WRIT OF CERTIORARI

Petitioner prays that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the Second Circuit, entered in the above cause on January 4, 1974, the opinion of the Court of Appeals is reported in ——F.2d—— (1974).

DECISION BELOW

FIRST: The Judgment of the United States Court of Appeals for the Second Circuit is contained in the Appendix.

SECOND: The order sought to be reviewed was entered on October 9, 1967 by a Special Inquiry Officer of the Immigration & Naturalization Service, and was affirmed by the Board of Immigration Appeals on September 18, 1968. The decision was affirmed by the Court of Appeals on January 4, 1974.

Jurisdiction to review in the matter sought herein is conferred upon this Court by 28 U.S.C., Section 1254(1).

THIRD: Questions presented for review are as follows:

(a) Whether deportation of Petitioner as an alien convicted under 18 U.S.C. Section 1546, would constitute cruel and unusual punishment for a criminal offense in violation of the Eighth Amendment to the Constitution.

(b) Whether the deportation of petitioner as an alien convicted under 18 U.S.C. Section 1546 constitutes the imposition of an additional penalty for a criminal offense based upon alienage and a denial to petitioner of equal protection of the laws and due process of law.

FOURTH: The statutory sections which this case involves are as follows: Immigration & Nationality Act, 66 Stat. 163 (1952), as amended: Section 241(a)(5), 8 U.S.C. 1251(a)(5); Section 402(a), 18 U.S.C. 1546.

STATEMENT OF THE CASE

FIFTH: The petitioner is a lawful permanent resident alien who resides in the United States with his wife and American citizen child. He entered the United States for permanent residence in 1960. In 1965, petitioner was convicted in the United States District Court for the Southern District of New York for violation of 18 U.S.C. Section 1546. The counts in the indictment alleging violation of 18 U.S.C. Section 1546, to which petitioner pleaded guilty, charged, in effect, that the petitioner had assisted others in obtaining immigrant visas by furnishing them with employment letters and affidavits of support which contained erroneous statements of fact. In January 1966, the petitioner was given a suspended sentence and was placed on probation for a period of one year. The period of probation was satisfactorily completed on January 27, 1967.

On June 9, 1966, deportation proceedings were commenced by the Immigration & Naturalization Service on the ground that petitioner is mandatorily subject to deportation pursuant to Section 241(a)(5) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(5), as a person who has been convicted under 18

COPY BOUND CLOSE IN CENTER

U.S.C. 1546, and was found deportable under that section, from which there is no administrative relief available. On October 9, 1967, an order was entered by a Special Inquiry Officer of the Immigration Service directing the petitioner's deportation to the Dominican Republic. The order of deportation was affirmed by the Board of Immigration Appeals on September 18, 1968, and by the Court of Appeals for the Second Circuit on January 4, 1974.

BASIS FOR FEDERAL JURISDICTION

SIXTH: The Federal statute which formed the basis for the deportation proceeding was the Immigration & Nationality Act, 66 Stat. 163 (1952), as amended, 8 U.S.C. 1101 et seq.; jurisdiction was vested in the United States Court of Appeals for the Second Circuit by virtue of 8 U.S.C., Sec. 1105(a).

REASONS FOR ALLOWING THE WRIT

SEVENTH: *The issues presented by the instant petition are of great Constitutional significance and should be determined by this Court.*

The issues presented in the present case raise serious and fundamental constitutional questions concerning the nature of due process of law, equal protection of the laws, and the concept of punishment for infraction of law. The resolution of these issues will affect not only petitioner, but millions of aliens who are lawful permanent residents of the United States.

a. Deportation of Petitioner Would be Cruel and Unusual Punishment in Contravention of the Eighth Amendment to the Constitution

In its opinion herein, the Court of Appeals rejected "out of hand" petitioner's claim that deportation constitutes cruel

and unusual punishment. Such determination was based upon the cases cited by the Court holding that deportation is a civil procedure and, therefore, not a penalty.

Petitioner submits that the concept that deportation is not a punishment or penalty is a "mammoth fiction" which should be reviewed by the Supreme Court. See Navasky, *Deportation as Punishment*, 27 U. Kansas City L. Rev. 213 (1959).

Petitioner was a lawful permanent resident alien convicted of violating 18 U.S.C. Section 1546. Such conviction was the exclusive basis for the order of deportation entered against him pursuant to Section 241(a)(5) of the Immigration & Nationality Act, 8 U.S.C. 1251(a)(5). Once a proceeding is commenced, the statute directs that an alien convicted under 18 U.S.C. Section 1546, be deported without any possibility of waiver or administrative relief.

Petitioner submits that the relevant portion of 8 U.S.C. 1251(a)(5) is clearly a penal provision in scope and intent. It imposes the additional penalty of deportation upon those aliens convicted under 18 U.S.C. Section 1546.

The present factual and legal situation is directly analagous to the case of *Trop v. Dulles*, 356 U.S. 86 (1958) in which the Supreme Court held unconstitutional a statute authorizing expatriation of American citizens convicted by a military court-martial of desertion from the United States Army in war time and given a dishonorable discharge. The major plurality opinion written by Chief Justice Earl Warren held that the involved sanction constituted a penalty and that such penalty was cruel and unusual within the meaning of the Eighth Amendment. In so concluding, the opinion devoted extensive consideration to the Government's contention that the denationalization statute [Section 401(g) of the Nationality Act of 1940, as amended, 8 U.S.C. 1481(a)] was a statute designed merely to regulate nationality which did not impose a penalty, and that constitutional limitations on the power of Congress to punish were, therefore, inapplicable. In concluding that a penalty was, in fact, intended, the Court noted that constitutional adjudication may not be controlled by the "labels pasted" on provisions of

statute by Congress, and that a "statute which imposes a disability for purposes of punishment — that is to reprimand the wrongdoer, to deter others, etc. . . . has been considered penal". [356 U.S. at 94, 95]. See also, *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963).

Of great significance regarding the Court's view of deportation was the following statement in *Trop, supra*, by Chief Justice Warren speaking for four Justices [356 U.S. at 98]:

> The Government argues that the sanction of denationalization . . . is not a penalty because deportation has not been so considered by this Court. While deportation is undoubtedly a harsh sanction that has a severe penal effect, this Court has in the past sustained deportation as an exercise of the sovereign's power to determine the conditions upon which an alien may reside in this country. . . . *this view of deportation may be highly fictional*, but even if its validity is conceded, it is wholly inapplicable to this case. [Emphasis supplied]

Petitioner submits that it is now time for the Court to reevaluate its view of deportation — especially in a situation such as the one at bar where a specified conviction makes an alien *per se* deportable — and to conclude that Section 241(a)(5) *supra* constitutes punishment imposed upon an alien for violation of 8 U.S.C. Section 1546.

Petitioner further submits that banishment from his home and adopted country constitutes punishment which is cruel and unusual under the standards set down in *Trop v. Dulles, supra*, and more recently by the Court in *Furman v. Georgia*, 408 U.S. 238 (1972). It is therefore respectfully requested that the validity of deportation as punishment and deterrance for a specific crime be reviewed by the Supreme Court in light of evolving standards of decency in a democratic society.

b. The Deportation of Petitioner Would Constitute the Imposition of an Additional Penalty for Conviction under 18 U.S.C. Section 1546 Based on Alienage, and Would Constitute a Denial of Due Process of Law and Equal Protection of the Laws

Petitioner submits that the Court should review the constitutional legality of subjecting permanent resident aliens to a greater penalty than are American citizens for conviction of the same offense. An American citizen convicted under 18 U.S.C. Section 1546 is subject only to a two thousand dollar fine or five years imprisonment, or both. An alien who is similarly convicted is liable not only to the specified fine and imprisonment, but is also liable to immediate deportation upon order of the Attorney General. For the reasons set out in the preceding section, such deportation is a penalty.

At this point in American legal history, there can be no doubt that the guarantee of due process of law in the Fifth Amendment contains within it a substantial element of equal protection of the laws. See, *Bolling v. Sharpe*, 347 U.S. 497 (1954); *United States Department of Agriculture v. Moreno*, 93 S.Ct. 2821 (1973). It is also well established that the guarantee of equal protection of the laws applies both to citizens and to aliens who are lawful permanent residents. See, *Sugarman v. Dougall*, 93 S.Ct. 2842 (1973); *Graham v. Richardson*, 403 U.S. 365 (1971); *Takahashi v. Fish & Game Commission*, 334 U.S. 410 (1948).

As an alien subjected to greater punishment than a citizen for conviction under the same statute, petitioner asks the Court to review the disparity of treatment explicit in the relevant statutes in light of the developing concept of equality under the law. In this regard, it is submitted that the above cited cases, and other cases in the equal protection area such as *Shapiro v. Thompson*, 394 U.S. 618 (1969) and *Loving v. Virginia*, 388 U.S. 1 (1967) support the conclusion that the distinction which Congress has made between aliens and citizens

in *this* context is arbitrary, invidious, without rational basis and unconstitutional.

CONCLUSION

For all of the foregoing reasons, the decision below should not be permitted to stand, and in light of the compelling equities and important legal issues involved, it should be reviewed and reversed by this Court.

Respectfully submitted,

FRIED, FRAGOMEN & DEL REY, P.C.

Attorneys for Petitioner

By: ELMER FRIED

AUSTIN T. FRAGOMEN, JR.
MARTIN L. ROTHSTEIN
Of Counsel

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 80—September Term, 1973.

rgued November 5, 1973 Decided January 4, 1974.)

Docket No. 32,879

AMADEO AUGUSTO LUCIANO SANTELISES, JR.,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

fore:

WATERMAN, FRIENDLY and TIMBERS,

Circuit Judges.

Petition to review order of Board of Immigration peals which dismissed appeal from order of an Immiation Judge who found petitioner deportable pursuant Section 241(a)(5) of the Immigration and Nationality , 8 U.S.C. §1251(a)(5)(1970), because of his conviction der 18 U.S.C. §1546 (1970).

Denied.

MARTIN L. ROTHSTEIN, New York, N.Y. (Austin T. Fragomen, Jr., New York, N.Y., on the brief), *for Petitioner.*

STANLEY H. WALLENSTEIN, Sp. Asst. U.S. Atty., New York, N.Y. (Paul J. Curran, U.S. Atty.,

and Joseph P. Marro, Asst. U.S. Atty., New York, N.Y., on the brief), *for Respondent.*

PER CURIAM:

On this petition to review an order of the Board of Immigration Appeals which dismissed an appeal from an order of an Immigration Judge who found petitioner deportable pursuant to Section 241(a)(5) of the Immigration and Nationality Act, 8 U.S.C. §1251(a)(5) (1970), because of his conviction under 18 U.S.C. §1546 (1970) (causing immigration visas to be accepted by others, knowing they were procured by fraud), petitioner claims that the deportation order violates the prohibition against cruel and unusual punishment and denies him the equal protection of the laws. We deny the petition to review.

Petitioner is a native and citizen of the Dominican Republic. He entered the United States as a permanent resident in 1960. Thereafter he resided here with his wife and child, both American citizens. He worked as a travel agent. In 1965, he was charged in the Southern District of New York with various offenses connected with the preparation and use of false immigration documents. He pled guilty to several counts, including two that charged misuse of visas and other entry documents in violation of 18 U.S.C. §1546 (1970). On January 28, 1966, he was sentenced to concurrent one year terms of probation.

In June 1966, the Immigration and Naturalization Service commenced deportation proceedings against petitioner pursuant to 8 U.S.C. §1251(a)(5) (1970), which authorizes the deportation of any alien who has been convicted of violating 18 U.S.C. §1546. At the deportation hearing in August 1966, petitioner conceded the factual allegations asserted by the INS, including his conviction under §1546; but he argued that deportation would violate his constitu-

rights referred to above. The Immigration Judge
ober 9, 1967 found petitioner deportable because of
viction; found that he was not entitled to any form
retionary relief; and ordered that he be deported
Dominican Republic, the country of his birth and
ality.

tioner appealed to the Board of Immigration Ap-
which entered an order on September 18, 1968 dis-
g the appeal. The instant petition seeks review of
ter order.[1]

reject out of hand petitioner's claim that deportation
tutes cruel and unusual punishment. It is settled that
tation, being a civil procedure, is not punishment
he cruel and unusual punishment clause of the
h Amendment accordingly is not applicable. See, e.g.,
iades v. *Shaughnessy*, 342 U.S. 580, 594-95 & n. 22
) (interpreting the ex post facto clause of Article I,
ting with approval *Fong Yue Ting* v. *United States*,
.S. 698, 730 (1892); *Buckley* v. *Gibney*, 332 F.Supp.
96 (S.D.N.Y.) (Wyatt, J.), *aff'd on opinion below*,
.2d 1305 (2 Cir. 1971), *cert. denied*, 405 U.S. 915
); *Cortez* v. *INS*, 395 F.2d 965, 967-68 (5 Cir. 1968);
v. *INS*, 350 F.2d 87, 90-91 (9 Cir. 1965), *cert. denied*,
.S. 915 (1966); *United States ex rel. Circella* v. *Sahli*,
.2d 33, 40 (7 Cir. 1954), *cert. denied*, 348 U.S. 964
).[2]

---

[1] The petition to review was filed in this Court on October 29, 1968. The government filed the administrative record on November 16, 1971. Petitioner's brief was filed on June 13, 1973. In the meanwhile, petitioner moved in the district court to set aside his conviction under §1546. That motion was denied on October 12, 1972. *Santelises* v. *United States*, 72 Civ. 1470 (S.D.N.Y. 1972) (unreported). We affirmed on April 12, 1973. 476 F.2d 787 (2 Cir. 1973).

[2] Petitioner relies upon a statement by Chief Justice Warren, speaking for four Justices, in *Trop* v. *Dulles*, 356 U.S. 86, 98 (1958), that the view that deportation was not a punishment but an implementation of

Nor do we find any merit in petitioner's equal protection claim. Whether it is his claim that he has been singled out for harsher treatment because of his conviction under §1546 than those convicted of crimes involving moral turpitude under Section 241(a)(4) of the Immigration and Nationality Act, 8 U.S.C. §1251(a)(4) (1970), or that as an alien he has been singled out for deportation whereas citizens convicted of the same or other crimes are not deported, his claim is wholly without merit. Deportation is not a remedy available against citizens but rather is an implementation of Congress' power to exclude. And the classification created by Section 241(a)(5) of the Act which is here involved—i.e. deportation of aliens convicted under §1546—surely has a rational basis: maintenance of the integrity of the immigration system by eliminating certain types of immigration frauds. Cf. *Dandridge* v. *Williams*, 397 U.S. 471 (1970); *Faustino* v. *INS*, 432 F.2d 429 (2 Cir. 1970), *cert. denied*, 401 U.S. 921 (1971).

Petition denied.[3]

---

the sovereign power to exclude "may be highly fictional." Petitioner's reliance upon this statement is misplaced. It was merely dictum since the case dealt with expatriation rather than deportation.

3 The Board of Immigration Appeals, in its order of September 18, 1968 dismissing petitioner's appeal from the deportation order, included a dictum which petitioner construes as indicating that he would not again become deportable by reason of the same conduct if, following his departure, he were to be lawfully admitted for permanent residence. The Department of State, in a letter dated May 7, 1970 to petitioner's counsel, expressed the opposite view. Petitioner asks us to "affirm" the Board's dictum referred to and to overrule the position of the Department of State. We decline the invitation. Our jurisdiction under Section 106(a) of the Immigration and Nationality Act, 8 U.S.C. §1105(a) (1970), is limited to "judicial review of all final orders of deportation." The Department of State letter is not a part of the administrative record upon which the deportation order below was based, see Section 106(a)(4), 8 U.S.C. §1105a(a)(4) (1970), and of course the letter is not a deportation order. In short, upon the instant petition to review, the issue of petitioner's future admissibility as an alien is not before us.

APPENDIX B

U.S. DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS

September 18, 1968

File: A-11629137 – New York

In re: AMADEO AUGUSTO LUCIANO-SANTELISES

IN DEPORTATION PROCEEDINGS

APPEAL

ORAL ARGUMENT: June 24, 1968
On behalf of respondent:
Edith Lowenstein, Esq.
36 West 44th Street
New York, New York 10036

On behalf of I & N Service:
R.A. Vielhaber, Esq.
Appellate Trial Attorney

CHARGES:
Order: Sec. 241(a)(5), I & N Act (8 USC 1251 (a)(5)) – convicted under 18 USC 1546
Lodged: None

APPLICATION: Remand for additional evidence

The respondent, a married male alien, a citizen of the Dominican Republic, appeals from an order entered by the special inquiry officer on October 9, 1967 directing the

respondent's deportation on the charge stated in the Order to Show Cause and denying his application for relief under Section 243(h) of the Immigration and Nationality Act. Counsel on appeal seeks a remand of the case for additional evidence that the alien will be subjected to persecution by reason of his race, religion or political opinion if he returns to the Dominican Republic.

The respondent last entered the United States for permanent residence on February 6, 1960. He was convicted on December 7, 1965 in the United States District Court, Southern District of New York for violation of Section 1546 of Title 18 of the United States Code. Section 241(a)(5) of the Immigration and Nationality Act requires the deportation of any alien in the United States who, "has been convicted under Section 1546 of Title 18 of the United States Code." The respondent is deportable as charged in the Order to Show Cause.

During the course of the hearing counsel then of record attacked the constitutionality of the statute under which the respondent has been found deportable. This Board does not adjudicate matters concerned with the constitutionality of the immigration laws (*Matter of L-*, 4 I & N Dec. 556).

The respondent has applied for a temporary withholding of his deportation pursuant to Section 243(h) alleging that he was politically active in opposing the Trujillo government in 1958. He also alleges that since his entry into the United States he has been active in the Dominican Revolutionary Party which seeks an overthrow of the present government in the Dominican Republic. There is evidence of record, however, that the respondent has returned to the Dominican Republic on several occasions since his entry for permanent residence and has not been molested. We affirm the denial of the respondent's application for relief under Section 243(h) of the Immigration

nd Nationality Act.

We have carefully reviewed the brief submitted by counsel nd have fully considered her argument before this Board on une 24, 1968. We find no basis nor has any evidence been ubmitted which warrants a remand of the case for an dditional hearing on the issue of relief under Section 243(h) of he Act.

Counsel raises the question as to whether the respondent ould be excludable if he is permitted to return to the United tates following his deportation. We held in *Matter of R-G-*, 8 I N Dec. 128 (BIA, September 2, 1958), that an alien eportable under Section 241(a)(5) of the Act (whether for ilure to comply with registration provisions of Section 265 or ecause of conviction under 18 USC 1546) such alien would ot again become deportable by reason of the same conduct hen, following departure, he has been lawfully admitted for ermanent residence. The respondent, however, would require a ant of permission to reapply for admission pursuant to ection 212(a)(17) of the Act.

An appropriate order will be entered dismissing the appeal.

ORDER: It is directed that the appeal be and the same is reby dismissed.

Acting Chairman